

U.S. Department of Labor

**Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005**

**(504) 589-6201
(504) 589-6268 (FAX)**



DATE ISSUED: April 11, 2000

CASE NO.: 1999-LHC-02194

OWCP NO.: 8-107682

In the Matter of:

**ARMANDO TREVINO,
Claimant**

v.

**FAIRWAY TERMINAL,
Employer**

and

**SIGNAL MUTUAL INDEMNITY,
Carrier**

APPEARANCES:

**GARY PITTS, ESQ.
For Claimant**

**RICK RAMBO, ESQ.
For Employer/Carrier**

**BEFORE: JAMES W. KERR, JR.
Administrative Law Judge**

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act") and the regulations promulgated thereunder. This claim is brought by Armando Trevino, Claimant, against his former employer, Fairway Terminal, Employer, and Signal Mutual Indemnity, Carrier. A hearing was held in Houston, Texas on December 15, 1999 at which time the parties were represented by counsel and given the opportunity to offer testimony and documentary evidence and to make oral argument. The following exhibits were received into evidence:

- 1) Court's Exhibit No. 1 ;
- 2) Claimant's Exhibits Nos. 1-42; and
- 3) Employer's Exhibits Nos. 1-13.¹

Upon conclusion of the hearing, the record remained open for submission of written closing arguments which were received by both parties. This decision is being rendered after having given full consideration to the entire record.

Stipulations

After evaluation of the entire record, the Court finds sufficient evidence to support the following stipulations:

- (1) That an injury/accident allegedly occurred on June 15, 1994;
- (2) That the fact of the accident is not disputed, but medical causation as to alleged injuries disputed;
- (3) That there was an employer/employee relationship existing at the time of the alleged injury is not disputed;
- (4) That the alleged injury arose in the course and within the scope of employment is not disputed;
- (5) That the date the Employer was notified of the injury was June 15, 1994 ;
- (6) That the date of notification of the injury/death pursuant to Section 12 of the Act to Employer was June 15, 1995 and to the Secretary of Labor was June 16, 1994;

¹ The following abbreviations will be used in citations to the record: CTX - Court's Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

- (7) That an informal conference was held on April 25, 1995;
- (8) That disability resulted from the injury is disputed;
- (9) That medical benefits and disability benefits were paid;
- (10) That Employer paid medical benefits of \$7,965.03 until October 30, 1995 and disability benefits of \$10,658.81 from June 16, 1994 until October 26, 1994;
- (11) That the Notice of Controversion was filed on October 21, 1994, December 28, 1995, and June 13, 1996;
- (12) That the date of maximum medical improvement is disputed. Claimant contends August 5, 1998 as per Dr. Cupic. Employer/Carrier contends October 26, 1994, 19 weeks after the accident; and
- (13) That Claimant's average weekly wage was \$560.99.

Issues

The unresolved issues in this proceeding are causation; nature and extent of disability; date of maximum medical improvement; Section 7 medical benefits; entitlement to 8(f) relief; and attorney's fees and expenses.

Summary of the Evidence

Armando Trevino

Armando Trevino, Claimant, testified that he worked as a longshoreman since the 1970s.² He stated that he was employed as a longshoreman at the time of his June 15, 1994 injury. Claimant testified that prior to his 1994 injury he suffered an electric shock at work in 1992 and was hit in the head by a hook at work also in 1992. He stated that he recovered from these injuries and returned to full-time work, which included lifting and throwing sacks and handling drums, without limitations for a year and a half before his 1994 injury. He added that as a longshoreman he worked as a forklift driver, an automobile driver, a winch operator, a switchman and a flagman. TR 16-19, 53, 54.

Claimant testified that he was injured at work on June 15, 1994 when he fell, striking his head,

²Because Claimant is not fluent in the English language, Lawrence A. Stelly, was duly sworn to serve as interpreter. Claimant testified that he speaks English fairly well but does not understand the language well and does not write the language. TR 16, 55.

left hip and feet. He was treated in the emergency room by Dr. Cupic, an orthopedist, who has continued to be his treating orthopedist. He stated that he has had several MRIs of his neck, mid-back and low back. He has also had CAT scans of his spine and EMGs. Claimant testified that he continues to have problems with headaches, movement of his hands and shoulders and considerable pain in his neck, thorax and hip. He acknowledged that he did have pain in his head, neck, and shoulders before the accident in 1994, but the pain had alleviated so that he could work his regular employment. He added that he had some weakness in his hands prior to the 1994 accident. Claimant testified that he had various symptoms prior to his accident which had abated at the time of his June 1994 injury. He stated that lifting and standing for extended periods increases his pain. Claimant testified that to do the type of work he was doing at the time of the accident one has to be healthy. He has not worked since his 1994 accident. Claimant testified that he has a sixth grade education and attended school in Monterey, Mexico. He stated that he worked as a house painter before doing longshore work and does not believe he has the education to do office work. Claimant testified that he had neurosurgery on his lower back approximately ten years prior to his 1994 accident, but recovered and returned to work. He stated that after being hit with the hook in 1992, he had recurring headaches which ceased and he returned to work. He added that he did have occasional headaches prior to the 1994 injury. Claimant testified that he had back injuries prior to his accident. He stated that he was awarded a lump sum disability payment for a 12% permanent partial disability to his right leg. TR 19-24, 29-43.

Claimant testified that he suffers depression primarily due to financial problems as he has a large family to maintain. He stated that he was proud of his work and would certainly make more by working than he does through compensation. He added that due to pain, inability to sleep due to pain, recurrent headaches and loss of concentration, he cannot work in any position. Claimant testified that although some doctors opined that he magnified his symptoms, he did not do so. He stated that he was simply trying to get help to "feel better." Claimant acknowledged that a number of doctors question his motivation and the presence of his problems, but added that the doctor who operated on him was not included. He stated that he did not know of any reason why the doctors would make false statements about him. TR 24, 25, 44-50, 55, 56.

Medical Evidence

Zoran Cupic, M.D., P.A.

Dr. Zoran Cupic, orthopedic surgeon, first examined Claimant on June 15, 1994, on referral from Pasadena General Hospital, after a work related accident which caused immediate pain in Claimant's spine and left leg. Dr. Cupic noted that Claimant had prior work related injuries to his head, neck and back which had improved and he was able to return to work. He stated that Claimant suffered neck pain in the midline radiating into his jaw, pain in his shoulders and both hands, weakness in his hands, ringing in his ears, and headaches since the accident. Claimant was also experiencing pain in the mid-back with some shortness of breath due to the pain; pain in the low back at belt level with more pain on the left side with radiculopathy into his left lower extremity, buttocks and toes; increased pain upon moving; numbness in both upper and lower extremities and pain in the groin. Dr. Cupic noted that x-rays showed no evidence of trauma to the bony parts of the thoracic and

lumbar spine. X-rays show degenerative changes. Upon physical examination, Dr. Cupic diagnosed severe cervical strain, moderately severe thoracic strain, severe lumbosacral strain, possible herniated nucleus pulposus and degenerative joint disease in the left hip. Dr. Cupic prescribed medrol, naprosyn and lortab. CX-5 pp. 1-3.

Dr. Cupic next examined Claimant, who showed slight improvement, on July 6, 1994. He continued to manifest pain in his low back and buttocks, bilateral groin pain, numbness in both hands, reduced hearing in his left ear, blurred vision and right knee pain. Dr. Cupic noted that Claimant had not received physical therapy as ordered as the insurance company would not give permission. He stated that he would see that Claimant would receive therapy. Dr. Cupic stated that if after three weeks of therapy, Claimant was not improved, he would order further testing. CX-5 p. 3.

Claimant visited Dr. Cupic on August 8, 1994 and October 10, 1994 showing no improvement. Dr. Cupic ordered an EMG and MRI of the neck and low back and a possible future bone scan. Claimant was prescribed Fiorinal, for headaches, and Voltaren. On October 10, 1994 Claimant was prescribed Soma for spasms, Oruval and Lortab. CX-5 pp. 3.

Dr. Cupic examined Claimant on November 15, 1994 finding no improvement. Dr. Cupic noted discoloration in Claimant's left foot. Claimant returned on December 12, 1994 showing no improvement and complaining of discomfort and numbness in his left testicle and penis. Dr. Cupic examined Claimant on January 23, 1995 and March 6, 1995 finding no improvement and additional urinary problems. He opined that Claimant needed a total myelogram. CX-10 pp 1.

A December 14, 1994 MRI of the Cervical Spine ordered by Dr. Cupic reflects that Claimant has a small, posterocentral disc protrusion at C5-6 without nerve root compression; a small, uncinat osteophyte/disc protrusion at C5-6 on the left, affecting the left C-6 nerve root; and a suspected small herniation on the left at the T1-T2 level. An MRI of the thoracic spine demonstrated a small disc protrusion at T1-2 and T3-4, with a slightly larger right paracentral disc herniation at the T5-6 level. An MRI of the lumbar spine noted a slight and very lateral subligamentous disc protrusion at L3-4, minimally contacting the left L3 dorsal root ganglion. High resolution myelography of the thoracic spine was suggested to better delineate the effect of the mid-thoracic abnormalities upon the thoracic spinal cord and particularly upon the right T6 nerve. Additionally, confirmatory myelography of the cervical region at C5-6 was suggested. A triphasic, radionuclide bone scan found mild, chronic spondylosis in the inferior cervical spine and the left side of the L4-5 region. CX-12 pp. 1,2; CX-13 pp.1,2; CX-14 pp. 1,2; CX-15 pp. 1,2.

Dr. Cupic examined Claimant on April 3, 1995 finding no improvement. On May 30, 1995, upon physical examination, Dr. Cupic noted that x-rays taken revealed a possible fracture of the left hip. He ordered a tomogram and counseled Claimant to use crutches and not to put any weight onto

his left hip. Claimant returned on June 22, 1995 unimproved. The tomogram had not been performed. CX-16 p. 1.

On August 29 and November 7, 1995, Dr. Cupic examined Claimant finding no improvement.

Claimant continued to experience left hip pain and had developed pain on the right side. He was also experiencing right knee pain, low back pain, dizziness, light headedness, ringing in both ears, numbness in the face and constant nausea. CX 18 p. 1.

In a "to whom it may concern" letter dated November 15, 1995, Dr. Cupic opined that Claimant had not responded well to conservative treatment and had been continuously totally disabled since the time of his accident. He noted that Claimant remained totally disabled. RX-6 p. 54.

Claimant visited Dr. Cupic on December 20, 1995, April 1, 1996, July 8, 1996, September 3, 1996, December 19, 1996, March 19, 1997, May 28, 1997, October 1, 1997. Claimant's condition was unimproved. An October 2, 1997 myelogram of Claimant's spine, ordered by Dr. Cupic, manifested no evidence of disc herniation or central canal stenosis in the cervical spine, spondylolysis at C5-C6 which minimally narrows the ventral subarachnoid space, and no evidence of lumbar stenosis or herniated disc. CTs of the cervical, lumbar and thoracic spine and the head were performed on the same day. The cervical view showed no central, lateral recess or foraminal stenosis, no disc herniation and spondylosis at C5-C6. The lumbar view demonstrated no central canal, lateral recess or foraminal stenosis at any level, mild spondylosis at all the interrogated levels between L2-L3 and L5-S1 and facet osteoarthritis severe at L4-L5 and L5-S1. The thoracic view showed small right paracentral disc herniations at T6-T7, T7-T8 and T8-T9 which narrowed the ventral subarachnoid space without displacing the spinal cord. Mild spondylotic changes were seen throughout the thoracic spine. The view of the head was normal. On December 3, 1997 Dr. Cupic examined Claimant and noted that Claimant would eventually need total hip replacement. CX-21 p. 1; CX-22 p. 1; CX-23 p.1; CX-24 p.1; CX-25 p. 1; RX-6 p. 65; CX-31 p. 1.

Dr. Cupic next examined Claimant on March 20, 1998; Claimant's condition remained unimproved. CX-33 p. 1.

On August 5, 1998, Dr. Cupic opined that Claimant had reached MMI and could do only sedentary work, working with his hands. He stated that Claimant had a lifting capacity not to exceed 10-15 pounds and must be allowed to stand up and move around as needed. CX-42.

Morteza Shamsnia, M.D.

Dr. Morteza Shamsnia, neurologist, examined Claimant on October 28, 1994 upon referral from Dr. Cupic. Upon physical examination Dr. Shamsnia recommended an EMG and NCS, pain management and pain therapy, an MRI and/or CT scan of lumbosacral and thoracic area. CX-7 pp. 1,2.

An EMG of the upper extremities performed on October 28, 1994 found mild left ulnar neuropathy and left thoracic radiculopathies. An EMG of the lower extremities found bilateral lumbo/sacral radiculopathies, left thoracic radiculopathies and asymmetrical H reflexes suggestive of right S1 radiculopathies. CX-8 pp. 1-3; CX-9 pp. 1-3.

Nicholas Checkles, M.D.

On January 6, 1998, Dr. Nicholas Checkles performed electrodiagnostic testing on Claimant upon referral from Dr. Sukhdev Peganyee. Testing demonstrated bilateral ulnar nerve entrapments at the elbow, bilateral tarsal tunnel syndrome and bilateral lumbosacral radiculopathy involving only posterior primary rami on EMG. CX-32 pp.1-3.

Lawrence Hurdiss, M.D.

Dr. Lawrence Hurdiss noted that x-rays of Claimant's knees showed a healed fracture of the distal left metadiaphysis of the fibula. CX-35 p. 1.

Josie Timm, M.D.

In x-rays of Claimant's lumbar spine taken May 28, 1998, Dr. Josie Timm noted marked disc space reduction with moderate posterior and marked anterior spondylosis at L4-L5 and mild disc space reduction at L3-L4 and mild anterior spondylosis from T11-12 through L3-L4. Dr. Timm also noted degenerative facet hypertrophy from L3-L4 to L5-S1, especially marked on the right at L4-L5. In x-rays of Claimant's pelvic region on the same date, Dr. Timm noted marked hip joint narrowing on the left with subcortical sclerosis and cystic change, remodeling of the acetabulum and femur head on the left and moderate joint space reduction on the right. Dr. Timm included that ossifications projecting over the iliac wings bilaterally, most likely represent dystrophic ossification which may be due to previous IM injections. Dr. Timm noted marked degenerative osteoarthritis involving Claimant's left hip. CX-36.

On June 3, 1998, Dr. Timm performed an MRI of Claimant's thoracic spine which indicated prominent posterior right paracentral disc herniation moderately indenting the spinal cord anteriorly on the right at T6-T7 and mild to moderate posterior protrusions at multiple levels without mass effect on the spinal cord or nerve root sleeves. An MRI on the same date Claimant's cervical spine indicated posterocentral disc herniation slightly indenting the anterior spinal cord in the midline at C4-C5 and posterior bulge with spondylosis and left-sided unvertebral joint hypertrophy abutting the anterior spinal cord and minimally flattening the anterior proximal left C6 nerve root sleeve at C5-C6. CX-38 pp. 1, 2.

On June 4, 1998, Dr. Timm performed an MRI of Claimant's lumbar spine which indicated anterolisthesis secondary to degenerative change on the right at L4-5 with broad-based pseudobulge with mild encroachment of the spinal canal on the thecal sac, broad-based mild disc bulges at L2-3, L3-4, L4-5 where pseudobulge present, a focal high intensity zone posterolaterally on the left at L3-4 suggesting a contained radial tear, marked right-sided facet arthrosis at L4-5 and moderate changes bilaterally at L5-S1 with mild changes from L1-2 to the L3-4 level and desiccated T11-12 disc with slight disc bulge. CX-39 pp. 1, 2.

B.T. Wright, Jr. M.D.

On July 1, 1998, Dr. B.T. Wright noted that Claimant's recent MRIs of his lumbar and thoracic spine manifested abnormalities. Dr. Wright referred Claimant for a home health service

assessment. CX-40.

Jack W. Pennington, M.D., P.A.

Dr. Jack Pennington, independent medical examiner, examined Claimant on September 18, 1995. Dr. Pennington reviewed Claimant's medical records from the date of injury at Pasadena General Hospital, Dr. Cupic, Dr. Shamsnia, physical therapy reports, the MRIs of December 1994, the bone scan of December 1994, Dr. Mobley and records of Claimant's previous work related injuries. Upon physical examination and a review of the aforementioned records, Dr. Pennington concluded that Claimant had suffered a sprain/strain of the spine and soft tissue injuries to other parts of the body. He stated that there is no objective evidence that Claimant sustained any significant aggravation of his preexisting conditions. He opined that there is strong evidence of symptom magnification and psychosocial issues and that Claimant was at MMI with the ability to return to his pre-injury work with no permanent impairment.³ RX-6 pp. 39-51.

In a missive dated October 30, 1995, Dr. Pennington opined that a soft tissue injury such as Claimant's usually resolves in two to four months. Accordingly, Claimant should have reached MMI within nineteen weeks of his injury. RX-6 pp. 52, 53.

Henry D. Wilde, Jr., M.D.

Dr. Wilde examined Claimant on December 11, 1995 relative to his work related injury of June 15, 1994. Upon physical examination and review of Claimant's medical records, Dr. Wilde diagnosed sprain and contusion of the buttocks, back and ribs, and avascular necrosis of the left femoral head. Dr. Wilde opined that the findings in Claimant's left hip were not related to his work-related injury of June 1994. He stated that Claimant had no objective findings of any residuals of injury related to the 1994 injury and that Claimant had reached MMI with no ratable impairment. CX 6 pp. 57, 58.

Other Evidence

William L. Quintanilla, M.Ed., L.P.C.

William Quintanilla, vocational rehabilitation specialist stated that, based on the opinion of Dr. Cupic, it is reasonable to assume that Mr. Trevino can return to work in such selected Longshore positions that fall within the light exertion range and do not exceed lifting over 15 pounds. Mr. Quintanilla noted that Claimant is capable of performing entry-level, unskilled work within the

³Dr. Pennington noted that a review of prior records manifests that, when examined by various examiners of multiple specialties, Claimant exhibited significant magnification-psychosocial issues. RX-6 p. 50.

sedentary to light exertion capacity that allows for alternate sit, stand and walk. RX-13 pp. 1, 2.

Mr. Quintanilla completed a labor market survey on November 23, 1999 noting positions within Claimant's limitations of assembler (Product Resources, Inc, \$7.00 per hour); gate attendant (Westwood Ridge Apartments, \$6.50 per hour); assembler (Link Staffing Services, \$7.00-\$7.50 per hour); property guard (Allied Security, Inc., \$7.00 per hour); courier (Tex Pack Express, \$7.00 per hour). RX-13 pp. 3, 4.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon the Court's observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, the Court has been guided by the principles enunciated in Director, OWCP v. Maher Terminals, Inc., 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, the Court may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on its own judgment to resolve factual disputes or conflicts in the evidence. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251, 28 BRBS 43 (1994).

I. Fact of Injury

To establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between the work and harm. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his injury was causally related to his employment if he establishes that he suffered a physical injury or harm and that working conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. See Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989). An accidental injury occurs if something unexpectedly goes wrong within the human frame. An injury need not involve an unusual strain or stress; it makes no difference that the injury might have occurred wherever the employee might have been. See Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968); Glens Falls Indemnity Co. v. Henderson, 212 F.2d 617 (5th Cir. 1954). The claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980). However, the claimant must show the existence of working conditions which could have conceivably caused the harm alleged. See Champion v. S&M Traylor Bros., 690 F.2d 285, 295 (D.C. Cir. 1982).

1. Claimant's Showing of a Harm

The first prong of Claimant's prima facie case requires him to establish the existence of a physical harm or injury. The Act defines an injury as the following:

accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S.C. § 902 (2).

2. Claimant's Showing of a Work Accident

In order to invoke the Section 20(a) presumption, Claimant must now show the occurrence of an accident or the existence of working conditions which could have caused the harm. The Section 20(a) presumption does not assist the Claimant in establishing the existence of a work-related accident. Mock v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 275 (1981). Therefore, Claimant has the burden of establishing the existence of such an accident by a preponderance of the evidence.

The parties have stipulated to the fact of Claimant's June 15, 1994 work related accident. However, Employer states that upon examination at the hospital on the day of the accident, Claimant complained only of low back pain and, thus, argues that Claimant's multiple problems are not related to his work injury.

This Court finds that the objective and subjective medical evidence establishes that Claimant's current medical problems are the result of his work related injury. Dr. Zoran Cupic, Claimant's treating physician, has treated Claimant for his work related injury since June 17, 1994, two days after the work accident. On November 15, 1995, Dr. Cupic, opined that Claimant had not responded well to conservative treatment and has been continuously totally disabled since the time of the accident. Dr. Zoran continued to treat Claimant and, on August 5, 1998, opined that Claimant had reached MMI. In contrast, Drs. Pennington and Wilde, both of whom saw Claimant on only one occasion, opined that Claimant's soft tissue injuries from the work related incident had resolved as of the date of the examination and that Claimant had reached MMI with no permanent impairment.⁴ In addition, Drs. Pennington and Wilde stated that, based on medical reports related to Claimant's prior injuries, Claimant was prone to symptom magnification. First, the Court finds that Dr. Cupic's decision must be given more weight than the two physicians who examined Claimant only once. Second, the Court finds that although Claimant had experienced prior work related injuries, evidence establishes that at the time of the June 1994 accident, he was working full time without restrictions. Also, Dr. Cupic's initial examination of Claimant, two days after his injury, found severe cervical and lumbosacral strain and moderately severe thoracic strain. Although Dr. Pennington opined that such soft tissue injuries as Claimant's "usually" resolve in two to four months, it is obvious from the

⁴The Court notes that Dr. Pennington saw Claimant on September 13, 1995 and Dr. Wilde examined Claimant on December 11, 1995.

medical records that Claimant's injuries have not resolved. Additionally, there is no evidence of record of a subsequent injury or intervening cause for Claimant's current problems. Thus, when reviewing all of the medical evidence including the 1997 CT scans and the 1998 MRIs, this Court finds that the evidence establishes that Claimant's current problems are the result of a continuum which had its genesis in Claimant's work related accident which caused injuries to his cervical, thoracic and lumbar spine.

Once Claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). The employer must present specific and comprehensive medical evidence proving the absence of or severing the connection between such harm and employment or working conditions. Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989); James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982); Del Vecchio v. Bowers, 296 U.S. 280 (1935).

This Court does not find that Employer has provided sufficient evidence to rebut the Section 20(a) presumption. Employer points to the testimony of physicians related to prior injuries to support a finding that Claimant has a history of symptom magnification. However, this Court finds that the medical evidence does not support Employer's contention relative to the June 1994 injury. After reviewing all of the subjective and objective medical evidence of record as well as Claimant's testimony, this Court finds it obvious that Claimant sustained an injury to his cervical, thoracic, and lumbar spine at work. Accordingly, this Court finds that Claimant has established his prima facie case while Employer has not provided sufficient evidence to rebut the presumption.

II. Maximum Medical Improvement

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. Louisiana Insurance Guaranty Assoc. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979). However, if the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that maximum medical improvement has been reached. Dixon v. John J. McMullen & Assoc., 19 BRBS 243, 245 (1986); See Mills v. Marine Repair Serv., 21 BRBS 115, 117 (1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially when the employee's recovery or ability is unknown. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986); White v. Exxon Co., 9 BRBS 138, 142 (1978), aff'd mem., 617 F.2d 292 (5th Cir. 1980).

A judge must make a specific factual finding regarding maximum medical improvement, and

cannot merely use the date when temporary total disability is cut off by statute. Thompson v. Quinton Eng'rs, 14 BRBS 395, 401(1981). If a physician does not specify the date of maximum medical improvement, however, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. See Jones v. Genco, Inc., 21 BRBS 12, 15(1988). The date of permanency may not be based on the mere speculation of a physician. Steig v. Lockheed Shipbuilding & Constr. Co., 3 BRBS 439, 441 (1976). In the absence of any other relevant evidence, the judge may use the date the claim was filed. Whyte v. General Dynamics Corp., 8 BRBS 706, 708(1978).

This Court finds that Claimant reached maximum medical improvement on August 5, 1998. On the aforementioned date, Claimant's treating physician, Dr. Cupic opined that Claimant no longer continued to show progress and, therefore, was at maximum medical improvement. In contrast, Drs. Pennington and Dr. Wilde found Claimant at MMI on September 13, 1995 and December 11, 1995 respectively. The Court give more weight to the opinion of Dr. Cupic, Claimant's treating physician and, thus, holds that Claimant reached MMI on August 5, 1998.

III. Nature and Extent of Disability

Disability under the Act means "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. §902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to either have no loss of wage earning capacity, a total loss, or a partial loss. The employee has the initial burden of proving total disability.

To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). It is not necessary that the work related injury be the sole cause of the claimant's disability. Therefore, when an injury accelerates, aggravates, or combines with the previous disability, the entire resulting disability is compensable. Independent Stevedore Co. v. Alerie, 357 F.2d 812 (9th Cir. 1966).

This Court finds that Claimant cannot return to his regular employment and, thus, has established a prima facie case of total disability. Dr. Zoran Cupic, Claimant's treating physician, restricted Claimant to sedentary work with a lifting restriction of not more than ten to fifteen pounds. In contrast, Dr. Pennington opined that Claimant could return to his former employment. Although, Dr. Wilde did not state that Claimant could return to his former employment, he did opine that Claimant had no impairment related to his June 1994 accident. This Court gives more weight to Claimant's treating physician, Dr. Cupic. Thus, this Court finds that Claimant cannot return to his regular employment and, therefore, is totally disabled.

Suitable Alternative Employment / Partial Disability

Total disability becomes partial on the earliest date that the employer establishes suitable

alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

This Court finds that Employer established suitable alternative employment on November 23, 1999. On that date Employer identified positions within Claimant's restrictions. The positions identified include assembler (Product Resources, Inc, \$7.00 per hour); gate attendant (Westwood Ridge Apartments, \$6.50 per hour); assembler (Link Staffing Services, \$7.00-\$7.50 per hour); property guard (Allied Security, Inc., \$7.00 per hour); courier (Tex Pack Express, \$7.00 per hour).⁵ Thus, as of November 23, 1999 Claimant's disability is partial.⁶

IV. Necessary and Reasonable Medical Expenses

Section 7(a) of the Act provides that:

(a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require.

33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury.

⁵The average of the stated positions if \$7.00 per hour.

⁶The Court notes that because Claimant reached MMI prior to this date, Claimant's disability is permanent partial.

Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th cir. 1981), aff'd 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'd 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983). The Fourth Circuit has reversed a holding by the Board that a request to the employer before seeking treatment is necessary only where the claimant is seeking reimbursement for medical expenses already paid. The court held that the prior request requirement applies at all times. Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'd 6 BRBS 550 (1977).

Section 7(d)(2) of the Act provides in pertinent part that:

(2) No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so.

33 U.S.C. § 907(d)(2).

The Court has previously found causation relative to Claimant's injury to his cervical, thoracic and lumbar spine. Thus, Claimant is entitled to reasonable and necessary medical treatment associated with his work related injury.

V. Section 8(f) Relief

Section 8(f) shifts part of the liability for permanent partial and permanent total disability, and death benefits, from the employer to the Special Fund established by Section 44, when the disability or death is not due solely to the injury which is the subject of the claim. The essential elements of Section 8(f) are met, and an employer's liability is limited to 104 weeks of compensation, if the record establishes that: (1) the employee had a pre-existing partial disability, (2) the partial disability was manifest to the employer, and (3) that it rendered the second injury more serious than it otherwise would have been. Director, OWCP v. Berkstresser, 921 F.2d 306, 309, 24 BRBS 69 (CRT) (D.C.

Cir. 1990), rev'g 16 BRBS 231 (1984), 22 BRBS 280 (1989). In cases of permanent total or permanent partial disability there are additional requirements. First, there must be a new injury. Second, the disability must not be due solely to the new injury. In addition, there is an additional requirement in cases of permanent partial disability. In those cases, the disability must be materially and substantially greater than that which would have resulted from the new injury alone. Jacksonville Shipyards v. Director, OWCP, 851 F.2d 1314, 1316-1317 (11th Cir. 1988); Director v. Newport News Shipbuilding & Dry Dock Co., 8 F.3d 175 (4th Cir. 1993).

The test of whether a pre-existing condition constitutes a permanent partial disability under Section 8(f) is whether it is sufficiently serious and lasting so as to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment-related accident and compensation liability. C&P Telephone Co. v. Director, OWCP, 564 F.2d 503, 513 (D.C. Cir. 1977). As the Board has stated: "medical records need not indicate the precise nature or severity of a pre-existing condition in order to satisfy the pre-existing permanent partial disability requirement of Section 8(f), so long as there is sufficient information to establish the existence of a serious lasting physical problem prior to the subsequent injury". Shrout v. General Dynamics, Corp., 27 BRBS 160, 167 (1993). Employer argues that if Claimant is partially disabled, then Claimant's disability is not due solely to his spinal injuries. Employer claims that Claimant has several pre-existing partial disabilities involving the back and other parts of his body. Employer notes that Claimant admitted at the formal hearing that during his deposition taken in connection with his December 1998 injury, he testified that he had five separate back injuries prior to his 1988 injury and had had back problems for almost ten years which resulted in Drs. DeYoung (15%) and Moldovan (15-20%) assigning permanent partial disability ratings to Claimant. Employer also argues that prior to his June 1994 injury, Claimant had sustained at least six allegedly disabling injuries to his cervical and lumbar spine. Additionally, Employer argues that Dr. Booker T. Wright had previously assessed a 12% permanent impairment to Claimant's right knee. This Court finds that at the time of the instant injury Claimant had a pre-existing partial disability. Thus, Employer has met the first element of Section 8(f).

The second element in establishing entitlement to Section 8(f) relief is that the pre-existing condition was manifest to the Employer prior to the second injury. It is not necessary that the pre-existing condition be known to the employer as long as it was objectively determinable from the medical records. Highsmith v. Newport New Shipbuilding, 26 BRBS 444, 454 (ALJ) (1992); Delinski v. Pragnot Air-Flex Corp., 9 BRBS 206 (1978), aff'd sub nom. Director, OWCP v. Brandt Air-Flex Corp., 645 F.2d 1053 (D.C. Cir. 1981). Based on Claimant's medical records in evidence, this Court finds that the pre-existing condition was manifest to the employer.

The third element is whether the initial injury rendered the second injury more serious than it otherwise would have been. In the instant case, the medical evidence relating to Claimant's prior back injuries and prior knee injury and the resulting impairment establishes that Claimant's prior injuries rendered the second injury more serious.

In cases of permanent total and permanent partial disability there are additional requirements which must be met. First, there must be a new injury or aggravation. Second, the disability must not be due solely to the new injury. The employer must show that the second injury by itself would

not have led to total disability. Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT)(5th Cir. 1990). The Court has previously found that Claimant suffered a new injury. In addition, the Court found Claimant partially disabled, thus, the second injury did not lead to total disability.

Under Section 8(f)(1), if the employment injury is a non-scheduled injury which results in permanent partial or permanent total disability, the employer's liability is limited to 104 weeks of compensation. Thereafter, the Special Fund makes the compensation payments. Therefore, Employer's 104 weeks of liability begins when Claimant has permanency status regarding his disability.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from June 14, 1994 until August 5, 1998, the date of maximum medical improvement, based on an average weekly wage of \$560.99.

(2) Employer/Carrier shall pay to Claimant compensation for permanent total disability benefits from August 6, 1998 until November 23, 1999, the date Employer established suitable alternative employment, based on an average weekly wage of \$560.99.

(3) Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits from November 24, 1999 and continuing based on a wage earning capacity of \$7.00 per hour and his average weekly wage of \$560.99, provided, however, that after 104 weeks the special Fund shall become liable as provided by § 8(f) of the Act.

(4) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. See 28 U.S.C. §1961.

(5) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.

(6) Employer/Carrier shall pay or reimburse Claimant for reasonable medical expenses, with interest in accordance with Section 1961, which resulted from the injury. See 33 U.S.C. §907.

(7) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully

supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have twenty (20) days from receipt of the fee petition in which to file a response.

Entered this ____ day of _____, 2000, at Metairie, Louisiana.

JAMES W. KERR, JR.
Administrative Law Judge

JWK/cmh